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February 22, 2011

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Preserving the Open Internet*, GN Docket No. 09-191

Dear Ms. Dortch:

In its letter dated February 18, Comcast accuses Level 3 of asking the Commission to “reverse its own prior statements and the plain text of the order” and of “drag[ing] the Commission where it should not go: into the heart of the Internet marketplace.”

These assertions do not reflect Level 3’s position. Level is not in favor of FCC or other government agency regulation of the hotly competitive Internet backbone industry. Level 3 contends, as explained below and in our February 14 letter to Chairman Genachowski, that Comcast has attempted to evade the reach of the Open Internet Order by requiring the purchase of a noncompetitive transport service to reach its ISP subscribers and labeling the noncompetitive service a “backbone service” that it claims is outside the scope of the Order.

Level 3 has not requested that the FCC take *any* action under the Open Internet Order. We have repeatedly pointed out that the Order is not yet effective and that, in any event, the Commission has no factual record upon which to determine if Comcast’s or Level 3’s position is correct. Our letters were written in response to a letter jointly submitted to the Commission by AT&T and the National Cable and Telecommunications Association requesting that Commission support Comcast’s position without any factual or procedural basis.

Regardless of Comcast’s florid prose, certain facts remain indisputable:

- Level 3 has the network facilities and the technical expertise to exchange traffic with Comcast at points within cities where the substantial majority of Comcast’s ISP customers reside.
- Comcast refuses to exchange traffic at these local interconnection points. Instead, Comcast has required Level 3 to pay Comcast for hauling traffic from existing interconnection points to its local cable franchise locations, referring to this arrangement as a “backbone service.”

- Comcast imposed this coercive arrangement to Level 3 as a “take it or leave it” demand and as a condition to Comcast accepting additional traffic that its subscribers requested.

Given that Level 3’s backbone operates on a larger scale than Comcast and that a substantial portion of Comcast’s intercity network utilizes fiber leased from Level 3, it is highly likely that Comcast’s cost to provide this “backbone service” is higher than Level 3’s cost. By any impartial analysis, this is hardly an agreement struck in an open, competitive marketplace. Why would Level 3 purchase from Comcast a service that Level 3 can provide itself – especially when Level 3’s cost are very probably less than Comcast’s? Because Comcast compelled it to do so in order to reach Comcast’s subscribers.

Comcast contends that “Level 3 has and will have a choice of a variety of paths onto ... Comcast’s network.” Comcast then insists, with no support, that Level 3 can use widely available “transit” services to reach Comcast if the “take it or leave it” terms offered by Comcast are not acceptable. Comcast asserts that Level 3 does not choose this option because accepting it would be inconsistent with Level 3’s status as a Tier 1 backbone provider that does not pay other companies to exchange traffic. On its face this assertion is illogical. Comcast insists that Level 3 must pay Comcast because of the increasing volume of traffic requested by Comcast’s subscribers that comes from the Level 3 network. Comcast seems to imply that it would not charge for exactly the same content if presented by some other “transit” provider. If this is the case, full disclosure of the conditions offered to other interconnected networks for settlement-free exchange of this traffic would greatly assist in the resolution of this dispute. If, on the other hand, Comcast expects to charge for such content, then Level 3 would pay twice and Comcast’s proposed third-party “transit solution” is no solution at all.

Comcast asserts that “content delivery is not and will not be affected by this dispute.” The short answer to this unsupported allegation is that, in this instance, delivery of Internet traffic was not impacted only because Level 3 acceded to Comcast’s demand for payment. In the absence of Level 3’s concession, the interconnection points between Level 3 and Comcast would have become congested, resulting in severe “packet loss” and adverse impacts on subscriber’s ability to access services.

Read as a whole, Comcast’s letter seems to argue that the Open Internet Order itself is unnecessary and unwarranted. Both the FCC and the Department of Justice – by requiring Comcast to agree to abide by the terms of the Order for 7 years – have rejected this position.

Why have many policymakers, regulators and industry participants including both Internet backbone companies and online media companies supported Level 3’s position? As Reed Hastings, the Co-Founder, Chairman and CEO of Netflix stated:

“Delivering Internet video in scale creates costs for both Netflix and for ISPs. We think the cost sharing between Internet video suppliers and ISPs should be that we have to haul the bits to the various regional front-doors that the ISPs operate, and that they then carry the bits the last mile to the consumer who has requested them, with each side paying its own costs. This open, regional, no-charges, interchange model is something for which we are advocating. Today,

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some ISPs charge us, or our CDN partners, to let in the bits their customers have requested from us, and we think this is inappropriate. As long as we pay for getting the bits to the regional interchanges of the ISP's choosing, we don't think they should be able to use their exclusive control of their residential customers to force us to pay them to let in the data their customers' desire. Their customers already pay them to deliver the bits on their network, and requiring us to pay even though we deliver the bits to their network is an inappropriate reflection of their last mile exclusive control of their residential customers."

The "open, regional no-charges, interchange model" advocated by Netflix is precisely the approach proposed by Level 3 to Comcast as a fair and equitable solution to our disagreement.

On one point Comcast and Level 3 do agree. If possible, a negotiated settlement between the parties enabling fair and equitable interconnection is preferable to either party being forced to request government intervention. Like Comcast, we remain prepared to pursue a negotiated solution to our dispute. Requesting that the FCC "prejudge" the merits of *either* Comcast's or Level 3's position without a factual basis to do so will not improve the odds of such a negotiated solution.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "James M. Ryan".

Chief Legal Officer

cc: Chairman Julius Genachowski
Commissioner Michael J. Copps
Commissioner Robert M. McDowell
Commissioner Mignon Clyburn
Commissioner Meredith Attwell Baker